



**Global Migration Group**

Acting together in a world on the move

## **GMG Briefing Note**

### **Migrants in vulnerable situations**

#### **Introduction**

Around the world, the human rights of millions of migrants, including many involved in large movements or mixed movements, are insufficiently protected or at risk of abuse.

In the New York Declaration for Refugees and Migrants, the General Assembly recognized the complex nature of contemporary movement: “Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change) or other environmental factors. Many move, indeed, for a combination of these reasons.”<sup>1</sup> The Secretary-General has also noted that, notwithstanding the gradual expansion of refugee protection, many people are compelled to leave their homes for reasons that do not fall within the refugee definition contained in the Convention relating to the Status of Refugees (see A/70/59, para. 18).<sup>2</sup>

While migration can be a positive and empowering experience for individuals and communities and can benefit countries of origin, transit and destination, it is clear that movement that places people in precarious situations is a serious human rights concern (A/HRC/31/35, 27). Where migrants fall outside the specific legal category of “refugee”, it may be especially important to ensure that their human rights are respected, protected and fulfilled. Some migrants will need specific protection because of the situations they left behind, the circumstances in which they travel or the conditions they face on arrival, or because of personal characteristics such as their age, gender identity, disability or health status.

The principles and guidelines focus on the human rights situation of those migrants who may not qualify as refugees under the Convention relating to the Status of Refugees, yet who are in vulnerable situations and thus in need of the protection of the international human rights framework (A/HRC/33/67). All persons, including non-nationals, have rights under international human rights law and related standards, and it is important to ensure that these rights are upheld. Where persons are entitled to specific protection under international instruments, it is equally important to guarantee these specific protections. Refugees and asylum seekers are entitled to specific protection under international and regional refugee law.<sup>3</sup> The human rights and particular needs of other persons,

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<sup>1</sup> See also the preamble to the Paris Agreement under the United Nations Framework Convention on Climate Change.

<sup>2</sup> On persons who are outside their country of origin and who may not qualify as refugees under international or regional law but who may in certain circumstances also require protection from return, see UNHCR, “Persons in need of international protection”, June 2017, available at [www.refworld.org/docid/596787734.html](http://www.refworld.org/docid/596787734.html).

<sup>3</sup> All persons who meet the refugee criteria under international refugee law are refugees for the purposes of international law, whether or not they have been formally recognized as such. See, notably, the 1951 Convention relating to the Status

including children, trafficked persons, migrant workers, stateless persons and persons with disabilities, have also been recognized in specific international instruments.<sup>4</sup> The development of the principles and guidelines is without prejudice to the specific rights accorded to these and other groups of people on the move.

When the international community adopted the Universal Declaration of Human Rights on 10 December 1948, the Declaration was accepted as a common standard for all peoples and nations. It spelled out, for the first time in human history, the minimum civil, political, economic, social and cultural rights that all human beings should enjoy. The International Bill of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) permits a distinction to be made between nationals and non-nationals in respect of only two rights, and only in certain circumstances.<sup>5</sup> Thus, with those narrow exceptions, the entire international human rights framework applies to all migrants, regardless of where they are, and regardless of their status.

Human rights are universal, inalienable, indivisible and interdependent. The international human rights framework makes clear that, to give effect to these rights and uphold the fundamental principle of nondiscrimination, duty bearers must consider the unique and individual circumstances of each person.<sup>6</sup> By becoming parties to international human rights treaties, States assume obligations under international law and undertake to establish domestic measures and legislation reflecting those obligations.<sup>7</sup> As a result, there may also be practical consequences for municipal authorities and local governments. States may also be responsible for the human rights consequences of actions, or failures to act, by private actors, including corporations, members of civil society and private security

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of Refugees and its 1967 Protocol, the Convention Governing the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees.

<sup>4</sup> See, specifically, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the ILO Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); the Convention relating to the Status of Stateless Persons; and the Convention on the Rights of Persons with Disabilities.

<sup>5</sup> Article 25 of the International Covenant on Civil and Political Rights reserves to citizens the right to vote and take part in public affairs, and article 12 reserves the right to freedom of movement within a country to foreigners who are lawfully present within the country. However, in its general comment No. 15 (1986) on the position of aliens under the Covenant, the Human Rights Committee has stated that a foreigner may enjoy the protection of article 12 of ICCPR in relation to entry or residence, for example, when considerations of nondiscrimination, prohibition of inhuman treatment and respect for family life arise. Article 2 (3) of the International Covenant on Economic, Social and Cultural Rights establishes one limited exception to the principle of non-discrimination on grounds of nationality in the enjoyment of the rights of the Covenant. This provision states: "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." However, article 2 (3) must be narrowly construed; the exception applies only to developing countries and it only concerns economic rights. Under the Covenant, a State may not discriminate on grounds of nationality or legal status. Any distinction, exclusion, restriction or preference, or other differential treatment on grounds of nationality or legal status, should be in accordance with the law, pursue a legitimate aim and remain legitimate to the aim pursued. The Committee on Economic, Social and Cultural Rights has stressed that without prejudice to the possibility for the State to order migrants who are undocumented or in an irregular situation to leave the territory, the very presence of such migrants under its jurisdiction imposes on the State certain obligations, including the primary obligation to acknowledge their presence and the fact that they can claim rights from national authorities. See E/C.12/2017/1, paras. 3, 5, 6 and 8; see also OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, 2014, pp. 31-32.

<sup>6</sup> Article 2 of the International Covenant on Civil and Political Rights makes clear that, with respect to all rights recognized by the Convention, the duty bearer is usually the State under whose jurisdiction a person is located. It obliges States to respect the rights recognized in the Covenant and ensure that they are enjoyed by all individuals who are within its territory and/or subject to its jurisdiction, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>7</sup> States assume obligations and duties under international law to respect, protect and fulfil human rights. The obligation to respect means that States must not interfere with or curtail the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses committed by third parties. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of human rights.

contractors. They have a duty to take appropriate steps to prevent human rights abuses that they are in a position to be aware of, to investigate and punish such abuses, and provide effective remedies and reparation.

### **Concept of “Migrants in Vulnerable Situations”**

The vulnerable situations that migrants face can arise from a range of factors that may intersect or coexist simultaneously, influencing and exacerbating each other and also evolving or changing over time as circumstances change. The concept of vulnerability is a foundational element of the human rights framework. Together with the requirement to uphold human dignity, the need to recognize and address vulnerability underpins the legal obligation of States to respect, protect and fulfil human rights.<sup>8</sup> “Migrants in vulnerable situations” are thus persons who are unable effectively to enjoy their human rights, are at increased risk of violations and abuse and who, accordingly, are entitled to call on a duty bearer’s heightened duty of care.

Factors that generate vulnerability may cause a migrant to leave their country of origin in the first place, may occur during transit or at destination, regardless of whether the original movement was freely chosen, or may be related to a migrant’s identity or circumstances.<sup>9</sup> Vulnerability in this context should therefore be understood as both situational and personal.<sup>10</sup> In either case, however, migrants are not inherently vulnerable, nor do they lack resilience and agency. Rather, vulnerability to human rights violations is the result of multiple and intersecting forms of discrimination, inequalities and structural and societal dynamics that lead to diminished and unequal levels of power and enjoyment of rights. As a matter of principle, and in order to ensure that every migrant is able to access appropriate protection of their rights, the situation of each person must be assessed individually.

#### **a. Vulnerable situations associated with the reasons for leaving the country of origin**

Among the many drivers of human movement are those that force people to move because they are unable to access their rights. In some circumstances, the resulting movement will not give rise to protection under international refugee law, but nonetheless will mean that the person is in need of the protection provided by international human rights law. Some migrants who move in these circumstances will be unable or unwilling to return to their country of origin.<sup>11</sup> Such drivers could

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<sup>8</sup> The preamble to the Universal Declaration of Human Rights recognizes in its first two paragraphs the primary concept of dignity as well as that of vulnerability, noting that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, but also that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind. The international human rights mechanisms have similarly highlighted that the aim of international human rights instruments is the protection of those most vulnerable to violations and abuse of their human rights. See, inter alia, Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties’ obligations, para. 12; and Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008) on women migrant workers, para. 22.

<sup>9</sup> The Human Rights Council, in its resolution 35/17, expressed serious concern about the particular, vulnerable situations and risks faced by migrants, which can arise from the reasons for leaving their country of origin, circumstances encountered by migrants en route, at borders and at destination, specific aspects of a person’s identity or circumstance or a combination of those factors.

<sup>10</sup> A human rights-based approach to migrants in vulnerable situations recognizes that both situational and personal vulnerability are created by external factors, by means of law, policy and practice. Therefore, such an approach seeks above all to empower migrants and does not stigmatize or deny them agency. See, for example, A/HRC/33/67, paras. 9-12; and A/71/285, paras. 59-61.

<sup>11</sup> Individuals who are outside their country of origin but who do not qualify as refugees under international or regional law may, in order to access their human rights, require protection from return on a temporary or longer-term basis, such as in the context of cross-border displacement related to disasters, climate change or other environmental factors. In some

include extreme poverty, natural disasters, climate change and environmental degradation, gender inequalities, separation from family, and lack of access to the rights to education, health, including sexual and reproductive health, decent work, or food and water. Migrants who are compelled to move are at greater risk of human rights violations throughout their migration (see A/HRC/31/35, para. 11). As noted above, in some circumstances, these drivers may sometimes give rise to refugee protection needs.<sup>12</sup>

**b. Vulnerable situations associated with situations that migrants encounter during their journey and at destination**

Migrants are often obliged to employ dangerous forms of transport or to travel in hazardous conditions. Many will make use of smugglers and other types of facilitator, some of whom may place them in situations of exploitation or subject them to other forms of abuse. Some may be at risk of trafficking as they move. During their journeys, migrants may lack water or adequate food, face violence or have no access to medical care. Many migrants spend long periods in transit countries, often in irregular and precarious conditions, unable to access justice and at risk of a range of human rights violations and abuses, including sexual and gender-based violence and treatment which may amount to torture and other cruel, inhuman or degrading treatment or punishment. A range of practices may put the health and safety of migrants at risk and expose them to human rights violations. These include: closure of borders; denial of access to effective screening and identification; arbitrary rejection at the border; collective expulsion; violence by State officials and other actors (including criminals and civilian militias); cruel, inhumane or degrading reception conditions; denial of humanitarian assistance; and failure to separate the delivery of services from immigration enforcement.

**c. Vulnerable situations associated with a person's identity, condition or circumstances**

As they move, some migrants are more at risk of human rights violations and abuses than others. Some will experience discrimination due, inter alia, to their age, gender, ethnicity, race, nationality, religion, language, sexual orientation, gender identity or migration status. Some experience discrimination on several and often intersecting grounds. People who are living in poverty, including because they are subject to discrimination due to their economic position, are particularly at risk of human rights abuses in the context of migration. Generally, pregnant or nursing women, persons in poor health (including those living with HIV), persons with disabilities, older persons and children, including unaccompanied or separated children, are specifically at risk because of their physical or psychological condition.

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circumstances, temporary protection or stay arrangements may be particularly suited to providing flexible and speedy responses to such protection needs. See, on the latter, UNHCR, "Guidelines on temporary protection or stay arrangements", February 2014, available at [www.refworld.org/docid/52fba2404.html](http://www.refworld.org/docid/52fba2404.html).

<sup>12</sup> See UNHCR, "Persons in need of international protection", June 2017, available at [www.refworld.org/docid/596787734.html](http://www.refworld.org/docid/596787734.html).

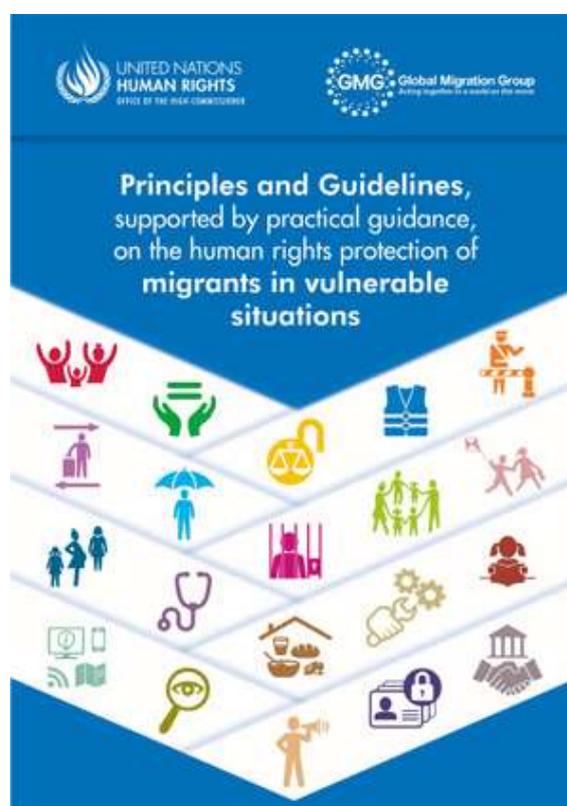
## Principles and Guidelines

The international human rights framework that States have put in place provides protection to all persons, including to all migrants. However, the framework's application to migrants who are in situations of vulnerability is often less clearly understood. States (and other stakeholders) therefore lack complete guidance on how to operationalize the framework in such situations. The principles and guidelines attempt to meet this need. They provide advice to States (and other stakeholders as relevant) on how they should implement their obligations to respect, protect and fulfil the human rights of migrants who are in vulnerable situations, including in the course of large or mixed movements. States are the primary duty bearer under international law.

The principles are drawn directly from international human rights law and related standards, including international labour law, as well as from international refugee law, criminal law, humanitarian law and the law of the sea, and are enshrined in treaty law, customary international law and general principles of law.<sup>13</sup>

The guidelines that follow each principle elaborate international best practice and are designed to assist States (and other stakeholders where relevant) to develop, strengthen, implement and monitor measures to protect and promote the human rights of migrants in vulnerable situations. They are derived from the instruments themselves, from authoritative interpretations or recommendations by international human rights treaty bodies and special procedure mandate holders of the Human Rights Council, as well as from other expert sources.<sup>14</sup>

It should be noted that the principles and the associated guidelines are interrelated and inform one another; the 20 principles should therefore be read together. The principles and guidelines are supplemented by an inventory of "practical guidance" which is available on the OHCHR website at the link below. The latter document is regularly updated with examples of good and promising practice on the human rights protection of migrants in vulnerable situations.<sup>15</sup>



<sup>13</sup> Selected extracts of international human rights law and related standards are listed in the annex.

<sup>14</sup> The guidance of international human rights treaty bodies and special procedure mandate holders has authority on several grounds. First of all, it is legally binding, to the extent that it is based on binding international human rights law. In addition, the treaty bodies were formally mandated and created under the provisions of the treaty they monitor; while the mandates of special rapporteurs are created and defined by States through the Human Rights Council. Both groups of experts benefit from their close collaboration with States in the system. Finally, the recommendations of treaty bodies and special procedure mandate holders acquire authority when international and regional judicial institutions reference them.

<sup>15</sup> See [www.ohchr.org/EN/Issues/Migration/Pages/VulnerableSituations.aspx](http://www.ohchr.org/EN/Issues/Migration/Pages/VulnerableSituations.aspx). It should be noted that OHCHR and the Global Migration Group have not independently verified the information contained in the inventory of good and promising practices, which is presented without claiming to be complete or geographically representative.

No.	PRINCIPLE
1	<b>Primacy of human rights</b> Ensure that human rights are at the centre of efforts to address migration in all its phases, including responses to large and mixed movements.
2	<b>Non-discrimination</b> Counter all forms of discrimination against migrants.
3	<b>Access to justice</b> Ensure that migrants have access to justice.
4	<b>Rescue and immediate assistance</b> Protect the lives and safety of migrants and ensure that all migrants facing risks to life or safety are rescued and offered immediate assistance.
5	<b>Border governance</b> Ensure that all border governance measures protect human rights.
6	<b>Human rights-based return</b> Ensure that all returns fully respect the human rights of migrants and comply with international law.
7	<b>Protection from violence and exploitation</b> Protect migrants from torture and all forms of violence and exploitation, whether inflicted by State or private actors.
8	<b>Ending immigration detention</b> Uphold the right of migrants to liberty and protect them from all forms of arbitrary detention. Make targeted efforts to end unlawful or arbitrary immigration detention of migrants. Never detain children because of their migration status or that of their parents.
9	<b>Protecting family unity</b> Ensure the widest protection of the family unity of migrants; facilitate family reunification; prevent arbitrary or unlawful interference in the right of migrants to enjoy private and family life.
10	<b>Migrant children</b> Guarantee the human rights of all children in the context of migration, and ensure that migrant children are treated as children first and foremost.
11	<b>Migrant women and girls</b> Protect the human rights of migrant women and girls.
12	<b>Right to health</b> Ensure that all migrants enjoy the highest attainable standard of physical and mental health.
13	<b>Right to adequate standard of living</b> Safeguard the right of migrants to an adequate standard of living.
14	<b>Right to work</b> Guarantee the right of migrants to work, in just and favourable conditions.
15	<b>Right to education</b> Protect the right of migrants to education.
16	<b>Right to information</b> Uphold migrants' right to information
17	<b>Monitoring and accountability</b> Ensure that all responses to migration, including large or mixed movements, are monitored and accountable.
18	<b>Human rights defenders</b> Respect and support the activities of human rights defenders who promote and protect the human rights of migrants.
19	<b>Data collection and protection</b> Improve the collection of disaggregated data on the human rights situation of migrants while protecting personal data and their right to privacy.
20	<b>Migration governance and cooperation</b> Ensure human rights-based and gender-responsive migration governance.